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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 743

UNITED STATES OF AMERICA, PETITIONER

v.

HARRY S. KNIGHT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit (R. 55), reversing respondent's conviction in the District Court for the Middle District of Pennsylvania on charges of abetting the trustee of a bankrupt estate in fraudulently appropriating property of the estate to his own use and conspiracy to do so.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 51-55) are reported at 180 F. 2d 55.

JURISDICTION

The judgment of the Court of Appeals was entered December 29, 1949 (R. 55). The Government's motions for leave to file an untimely petition for rehearing (R. 55-58; 64-65) were granted on January 31, and February 15, 1950 (R. 64, 66), and the petition for rehearing (R. 157-177) was filed on February 21, 1950. It was denied on March 13, 1950 (R. 205). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether an attorney's conviction of the crime of abetting the trustee of a bankrupt estate in misappropriating its assets should be set aside solely because of references in the prosecutor's summation—made in response to argumentative statements in defense counsel's summations concerning the defendant's standing as a lawyer—to the defendant's failure to live up to the high standards of his position as a leader of the bar.

STATEMENT

For the second time the Government asks the Court to review a judgment of the Court of Appeals for the Third Circuit reversing respondent's conviction under the bankruptcy laws. In *United States* v. *Knight,* 336 U. S. 505, this Court reversed an earlier judgment of the court below setting aside respondent's conviction. The court below has in the meantime again set the conviction aside.

Preliminarily to setting forth the relevant facts bearing on the new issue presented, it will be appropriate, for purposes of clarity, to sketch briefly the facts antedating this Court's earlier decision. In setting forth these preliminary facts, we shall refer to the printed record before this Court in the earlier proceeding (No. 406, Oct. Term, 1948) by the designation "Former R." to distinguish it from the printed record before the Court in the present proceeding (herein designated "R.").

1. Respondent was convicted in 1945, following a trial by jury in the District Court for the Middle District of Pennsylvania, of aiding and abetting the trustee of the bankrupt estate of the Central Forging Company in fraudulently appropriating $3,000 of the estate to his own use, in violation of § 29(a) of the Bankruptcy Act of 1898, as amended (then 11 U. S. C. 52(a); now 18 U. S. C. 153), and of conspiring to do so (Former R. 7-15, 808). He was sentenced generally to pay a fine of $1,000 (*id.* 827).

At the time of the criminal activities charged, respondent, an attorney, was special counsel for the Maxi Manufacturing Company, which assumed title to the assets of the Central Forging Company under a plan of reorganization filed and consummated in the District Court for the Middle District of Pennsylvania under the supervision of former Judge Albert W. Johnson of that court (Former R. 830, 832-833). Four persons were charged in

the indictment as co-defendants of respondent (*id.* 7-13). One of these, Robert Michael, the trustee and principal defendant, pleaded guilty (*id.* 1) and became the chief prosecution witness (*id.* 26-388). Of the remaining three, one, George L. Fenner, Sr., general counsel for the Maxi Manufacturing Company (*id.* 579), was convicted but did not appeal (*id.* 808, 829). The other two defendants were acquitted (*id.* 808). They were Homer N. Davis, secretary and treasurer of the Maxi Manufacturing Company (*id.* 48), and Donald M. Johnson, Judge Johnson's son (*id.* 29-30), who, according to the Government's evidence, was the ultimate recipient of the misappropriated funds (*id.* 105-149), though there was no evidence that he participated directly in the complicated legal manipulations (see *id.* 830-834; and see pp. 7-30 of our brief on the writ in the former proceeding) whereby $3,000 of the bankrupt's assets was misappropriated.

Respondent appealed his conviction to the court below, assigning as error, *inter alia,* the refusal of the trial court to grant him a directed verdict of not guilty (Former R. 829-830, 836). The court below, one judge dissenting (*id.* 836-838), reversed the conviction solely on this ground, and directed entry of a judgment of acquittal (*id.* 836, 839). In view of this disposition of the case, the court found it unnecessary to consider other alleged errors (*id.* 836).

This Court, on April 4, 1949, on writ of certiorari granted on the Government's petition, reversed the judgment of the Court of Appeals (*United States* v. *Knight,* 336 U. S. 505), observing in its opinion that "[t]here was substantial evidence" that $3,000 of the bankrupt estate was in fact misappropriated as charged, that "Knight was party" to the scheme, and that, consequently, the Court of Appeals' reversal of the latter's conviction for insufficiency of the evidence was "an improper interference with the jury's function" (*id.* at 508).[1]

2. On remand of the cause for further proceedings in conformity with the opinion and judgment of this Court, the Court of Appeals set the case down for reargument of the questions which it had previously found it unnecessary to reach. Thereafter, the court again reversed the conviction by a divided vote,[2] this time with directions for a new trial, on the sole ground that government counsel at the trial, in his summation to the jury, had

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[1] The Government's evidence against respondent is briefly outlined in the Court's opinion (336 U. S. at 506-507). For a more detailed summary of the evidence, see pp. 4-13 of our previous petition for certiorari (No. 406, Oct. Term, 1948). Our main brief on the writ, at pp. 4-43, sets forth the evidence fully. It contains, at pp. 39-43, under the heading "Respondent's prior contradictory testimony," previous damaging admissions by respondent.

[2] The same panel of judges sat on the reargument as had sat on the original argument, and they divided in the same manner as before—Maris and McLaughlin, JJ., voting to reverse the conviction (R. 51-54), and Kalodner, J., dissenting (R. 54-55).

unduly emphasized respondent's "position as a lawyer [in the reorganization proceeding out of which the criminal charges arose] and his failure to live up to the high standards of his position as a leader of the bar" (R. 53).[3] Excerpts from government counsel's summation, quoted in the majority opinion in substantiation of this conclusion (R. 53-54), are reproduced in the margin.[4] The

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[3] Of other alleged errors assigned, only one—a charge that the indictment had not been returned within the period of the statute of limitations—was considered by the court, and this was decided in favor of the Government (R. 51-53).

[4] "It has been said here repeatedly that Harry Knight has been for years an important officer of the American Bar Association. Everyone knows, every lawyer knows that the American Bar Association has drafted and promulgated a canon of ethics to which every lawyer is bound. It was the duty of Harry Knight as an officer of this court, it was his duty as an officer of the American Bar Association, it was his duty as a lawyer upon knowing that a diversion of funds was taking place, it was his obligation to report it to the Court, his obligation was no less than that of Robert Michael's. * * *" [R. 27].

* * * * *

"* * * And again I say, under his oath as a member of the Bar, under his oath as a member of the Bar of this Court, under his obligation as an officer of the American Bar Association to adhere to its canon of ethics, Harry Knight was obligated to report to the Court that a false document had been submitted, upon which the Court might base its allowances." [R. 28-29].

* * * * *

"I am not going to take any more of your time, ladies and gentlemen; the only thing I want to say now is that the importance of this case is very great. Involved here is the protection of the functions of the courts of the United States, particularly in its bankruptcy functions. Involved here is not only the integrity of the courts, but the integrity of the Bar of this State, the integrity of lawyers generally. That

majority remarked (R. 54) that the trial judge had denied a motion made on respondent's behalf for the withdrawal of a juror by reason of these remarks of the prosecutor (see R. 37-38), and that, in addition, he had (R. 54)—

> * * * failed to correct them by making clear to the jury in his charge that their sole duty with respect to the appellant was to determine whether he was guilty of the offenses charged in the indictment, that the appellant's duty to obey the provisions of the Bankruptcy Act therein charged to have been violated was no greater than that of his codefendants, and that they, the jury, were not charged with determining by their verdict whether the appellant had been guilty of professional misconduct.

Accordingly, the majority concluded that prejudicial error had occurred, requiring a new trial, because of a possibility that "the jury was misled by these statements of government counsel into considering the appellant's professional misconduct instead of his criminal guilt" (R. 54).

REASONS FOR GRANTING THE WRIT[5]

Respondent, a lawyer, has been convicted of aiding and abetting the trustee of a bankrupt estate

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protection we are entitled to hear from your lips, a condemnation of what the unscrupulous lawyer will do." [R. 36].

At the time of the trial, respondent was Secretary of the American Bar Association, a position he had held for nine years (R. 2). For other positions of distinction in the legal profession held by respondent at the time and previously, see his testimony at R. 1-3.

[5] All the arguments herein advanced were unsuccessfully urged in our petition for rehearing in the court below

in fraudulently appropriating assets thereof to personal uses in violation of the bankruptcy laws. This Court, reversing an earlier judgment of the court below, has sustained that conviction as against the contention that the evidence failed to support the charges. The court below has again set the conviction aside on the sole ground that the jury may possibly have been misled, by certain remarks of the prosecutor in his closing argument, "into considering the [respondent's] professional misconduct instead of his criminal guilt" in finding him guilty (R. 54). For the reasons which follow, we submit that the judgment below is in conflict with applicable decisions of this Court and at least five other Courts of Appeals, and, further, that the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

1. The remarks of the prosecutor which the court below held to be unfairly inflammatory are set forth in footnote 4, *supra,* pp 6-7. They contain no factual misstatements, are based entirely upon record testimony (as pointed out in footnote 4), and, moreover, constitute a very small segment of

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(R. 157-177). The petition for rehearing was filed after the record on appeal had been supplemented by the inclusion of the summation of respondent's trial attorney (R. 66-81) and those of the attorneys for his three co-defendants (R. 81-155). These summations were not contained in the record at the time the court below entered its judgment of reversal. See R. 55-58, 64-66. The court did not write an opinion in denying the petition for rehearing (R. 205).

a summation extending over some 34 pages of the printed record (R. 3-37),[6] which was devoted to a thorough and critical analysis and review of the evidence in the case as viewed from an advocate's standpoint. The criticized statements advert to the undeniable fact that respondent's position as an attorney and officer of the court in the reorganization proceedings out of which the criminal charges arose placed upon him a high duty to report to the bankruptcy judge the fact, well known to him (as the Government's evidence showed), that a substantial portion of the bankrupt's assets was being criminally diverted to personal uses. This much was certainly fair advocacy. Did the prosecutor, by alluding to respondent's position as "an important officer of the American Bar Association," which "has drafted and promulgated a canon of ethics to which every lawyer is bound," etc., so far overstep the bounds of propriety as to warrant reversal of the judgment of conviction? We do not believe that these few references, even if they be considered alone, can be held to have unjustly affected the trial or the jury's verdict. But even if it be assumed, *arguendo,* that such remarks might properly have been subject to criticism *if volunteered without provocation,* we submit that they were not improper—and certainly not such as to warrant reversal—because they were plainly invited by repeated

[6] See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 242.

argumentative remarks of the defense attorneys in their summations.

In the appendix to our petition for rehearing in the court below (R. 175-177), there are reproduced pertinent extracts from the summations of the four defense attorneys, which, in our judgment, justified government counsel in making the remarks in his summation which the majority below held to have been improper.[7] The defense attorneys, in endeavoring to convince the jury that respondent's activities in connection with the controversial $3,000 of the bankrupt's assets were all lawful and proper, time after time referred to respondent in such terms as "a man of the highest reputation" (R. 175, 67), "a member of the Bar who stands out nationally famous" (*ibid.*), a man whom the Supreme Court of Pennsylvania had appointed to "committee after committee" (R. 175, 127), "Secretary of the American Bar Association" (R. 175, 176, 127, 134), "a gentleman who is thought enough of amongst his associates to hold one of the great offices of the Association of American Lawyers" (R. 177, 143), etc. It was, thus, the defense attorneys who injected into the arguments to the jury the whole matter of respondent's distinguished career at the bar, and particularly his position as "an important officer of the American Bar Association." If it was fair for defense counsel to advert

[7] The excerpts from defense counsel's summations to which we refer may be found in their full context at R. 67, 77 (Mr. Levy); R. 127 (Mr. Robinson); R. 134, 143 (Mr. Coughlin); R. 95 (Mr. Margiotti).

to such considerations in their summations, it was, we submit, equally fair for government counsel—indeed it was his duty—to reply by urging to the jury that respondent's high attainments at the bar made his knowledge of the wrong-doing all the more probable and his offense all the more blameworthy.

Fundamental in the law relating to the limits of propriety in advocacy at a criminal trial is the principle that the prosecutor's summation to the jury must be judged in the light of the summations of defense counsel who have preceded him; statements which might be considered uncalled-for, prejudicial, and beyond the bounds of propriety, if uttered without provocation or invitation, are universally held to be proper responsive argument, or at least not such as to constitute reversible error, where they are made in answer to argumentative remarks of opposing counsel. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 240-242; *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 637 (C. A. 2), certiorari denied, 329 U. S. 742; *Bratcher* v. *United States*, 149 F. 2d 742, 746 (C. A. 4), certiorari denied, 325 U. S. 885; *Springer* v. *United States*, 148 F. 2d 411, 414 (C. A. 9); *United States* v. *Wernecke*, 138 F. 2d 561, 565 (C. A. 7), certiorari denied, 321 U. S. 771; *Hilliard* v. *United States*, 121 F. 2d 992, 996-997 (C. A. 4), certiorari denied, 314 U. S. 627; *United States* v. *Kortepeter*, 114 F. 2d 124, 128 (C. A. 7),

certiorari denied, 311 U. S. 711; *United States* v. *Dilliard,* 101 F. 2d 829, 837-838 (C. A. 2), certiorari denied, 306 U. S. 635; *Malone* v. *United States,* 94 F. 2d 281, 288 (C. A. 7), certiorari denied, 304 U. S. 562; *Vause* v. *United States,* 53 F. 2d 346, 354 (C. A. 2) certiorari denied, 284 U. S. 661; *Schauble* v. *United States,* 40 F. 2d 363, 366-367 (C. A. 8); *Kearns* v. *United States,* 27 F. 2d 854, 856 (C. A. 9), certiorari denied, 278 U. S. 652; *United States* v. *German,* 115 Fed. 987, 989-990 (W. D. Ky.); cf. *Christensen* v. *United States,* 16 F. 2d 29, 30-31 (C. A. 9).[8]

So basic is the rule permitting the prosecutor to make responsive remarks which, but for their having been invited by opposing counsel's argument, would be improper, that it has been applied by the Second, Fourth, and Eighth Circuits even in cases where the responsive remarks have the effect of calling the jury's attention to the ac-

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[8] In our petition for rehearing below (see R. 163-165), we set forth the relevant facts in several of the cited cases, including this Court's *Socony-Vacuum* decision, coupled with short quotations from the opinions, to assist the court below in comparing the criticized remarks of the prosecutor in the instant case with those of the prosecutors in the cited cases, which were alleged to have been so prejudicial as to require new trials, but which were held to have been either proper responsive argument or at least not such as to justify the award of new trials. We respectfully refer the Court to our analyses of those cases, which, for brevity's sake, we do not repeat here. It is submitted that, to use the language of Judge Learned Hand in the *Dilliard* case, *supra,* 101 F. 2d at 837-838 (see R. 165), the remarks of the prosecutor in the present case on which the reversal below hinged were "comparatively pallid in comparison to much that courts have approved."

cused's failure to testify—one of the most jealously safeguarded privileges of a defendant in a criminal trial. *Baker* v. *United States,* 115 F. 2d 533, 543-544 (C. A. 8), certiorari denied, 312 U. S. 692; *Comeriato* v. *United States,* 58 F. 2d 557, 558 (C. A. 4), certiorari denied, 286 U. S. 566; *United States* v. *De Vasto,* 52 F. 2d 26, 30 (C. A. 2), certiorari denied, 284 U. S. 678; *Rice* v. *United States,* 35 F. 2d 689, 694-695 (C. A. 2), certiorari denied, 281 U. S. 730.[9] Indeed, the principle has been applied by this Court even in a case involving the death sentence. *Crumpton* v. *United States,* 138 U. S. 361, 363-364.[10] The Ninth Circuit has also applied, in an appeal from a death sentence, the rule we invoke. *Ochoa* v. *United States,* 167 F. 2d 341, 344.

In *Berger* v. *United States,* 295 U. S. 78, 88, this Court summed up the prosecutor's duty as follows:

> * * * He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

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[9] See R. 166, footnote, where the facts of the *Baker* case, and a significant quotation from the court's opinion, were set forth in our petition for rehearing below.

[10] See R. 167 for the facts in the *Crumpton* case, as set forth in our petition for rehearing.

In the case at bar, the prosecutor argued the Government's case to the jury "with earnestness and vigor," and struck "hard blows," but he cannot, it is submitted, be justly accused of having struck "foul ones."[11] In again reversing respondent's conviction on the ground it chose, the Court of Appeals has plainly disregarded these tests by which a prosecutor's actions must be judged, and has laid down a new rule severely hobbling federal district attorneys. Its decision is of serious consequence not only to respondent's case but in all federal criminal trials.

2. The majority below expressed concern, as we have indicated (*supra,* p. 7), that the jury may have received, as a result of the prosecutor's remarks which the court criticized, an erroneous impression as to just what respondent was charged

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[11] This Court in the *Berger* case reversed a conviction because of highly improper conduct on the part of the prosecutor both during the trial and in his summation. But examination of the instances of that misconduct, as reviewed in the Court's opinion (295 U.S. at 84-88), will show that the challenged remarks of the prosecutor in the case at bar were a far cry indeed from the tactics of the prosecutor which this Court so severely censured in the *Berger* case. Indicative of the vast gulf of difference between the *Berger* prosecutor's conduct and that of the prosecutor in this case is the following excerpt from the summation of Mr. Margiotti, one of his *opposing counsel,* made after a long and hard-fought trial (R. 84):

> "Counsel for the Government, I say to you, have performed their duty fully, I believe that they have introduced their evidence honestly and fairly. I have tried a lot of cases, * * * and I have never in my experience found two more capable gentlemen and two finer men than the two men that are seated there representing the Government. * * * They have hit hard, as hard as they could, but they haven't hit below the belt * * *."

with, and criticized the trial judge's instructions to the jury for "fail[ing] to correct" that impression. We submit (a) that the criticism of the instructions is not warranted, and (b) that there was no real danger that the jury was misled into convicting respondent for professional misconduct rather than for having committed the specific acts charged in the indictment.

(a) At the end of his charge to the jury (R. 40-49), which closed with a cautionary instruction to disregard comments of counsel which did not conform to the jury's own recollection of the evidence (R. 48-49), the trial judge asked, "Any exceptions, gentlemen?" (R. 49). Respondent's counsel, Mr. Levy, replied merely, "We just require a general exception, if your Honor please." The judge observed in reply to this that a "general exception" was pointless, since it "doesn't point out to me where I have erred," but agreed to note it on the record "for anything you may gather from it." Counsel indicated no intention of being more specific. (R. 49.)

Of course, a mere "general exception" to a trial judge's instructions is entirely ineffectual to present for review any claimed error either of commission or omission; an alleged deficiency of either type must be specifically called to the judge's attention in order to afford him an opportunity to correct or amend his charge should he believe the criticism of it to be warranted. See Rule 30, F. R.

Crim. P., and the many authorities cited at R. 171, footnote. The trial judge here would undoubtedly have supplemented his charge with any appropriate specific instruction, had he been requested to do so by respondent's counsel. But since counsel made no effort to secure any additional instruction, there is no basis in the record for any criticism of the judge's charge as such.[12]

(b) There was no real danger of the jury's being misled into considering respondent's professional misconduct, rather than his guilt under the indictment, in returning their verdict. The trial judge, in his charge, carefully instructed the jury as to the elements of the offense charged in each count (see R. 40-41, 42-43; and see our petition for rehearing below at R. 173-174). The jury were likewise carefully instructed in respect of the presumption of innocence, the meaning of reasonable doubt (R. 44-45), etc. These instructions, coming after counsel's arguments, made it entirely clear to the jury exactly what each defendant was charged with. And, as we have noted, the judge would undoubtedly have added any proper specific instruction on respondent's behalf, had he been

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[12] We think it significant that respondent's counsel sought a mistrial because of the prosecutor's remarks at the close of the summation (R. 37-38; *supra*, p. 7) but did not attempt, at any time, to obtain any clarifying or correcting instructions which would have removed any harmful effects the prosecutor's remarks may have been thought to have.

asked to do so, just as he gave specific instructions requested by two of respondent's codefendants (see R. 47-48). It is wholly unrealistic, in our view, to assume that respondent may have been convicted because he violated the legal canons of ethics rather than the bankruptcy act.

3. The decision below was based, at least in part (see last paragraph of the majority opinion, R. 54), on the majority's belief that the Government's case against respondent was less strong than its case against his acquitted codefendants, particularly Donald Johnson. It is true that the Government's position at the trial, based upon the evidence it adduced (see Former R. 105-149), was that Johnson—to use the language of the majority below (R. 54)—was the "sole beneficiary of the conspiracy charged." It is not possible, of course, to know with certainty whether the jury disbelieved that portion of the Government's evidence which indicated that fact, or whether they exercised their prerogative of acquitting Johnson in the teeth of the evidence, or whether they acquitted him on the theory that, though he received the fruits of the conspiracy, he did not directly and personally participate in the legal manipulations whereby $3,000 of the bankrupt's assets was misappropriated (see p. 4, *supra*). However, there are sound grounds for believing that it was the last-

mentioned of these possible reasons that best explains Johnson's acquittal.[13] But whatever the explanation of the acquittal of Johnson, it in no way detracts from the strength of the evidence against respondent, which this Court has already held was at least "substantial" (*supra,* p. 5).

CONCLUSION

The events out of which the criminal charges in this case arose occurred more than eight years ago. The trial itself took place more than four years ago and consumed nearly four full weeks (Former R. 2). The case was an unusually complicated one in that the criminal charges grew out of a complex reorganization proceeding, in which the checks representing the misappropriated funds had to be patiently sifted from a great mass of checks and related documentary evidence that were routine in nature.[14] We think there is no just need to impose upon the Government the heavy burden of having to go to trial again so many years after the original trial and the events which gave rise to it. Respondent has had a fair trial, and this Court has confirmed the substantiality of the evidence on which his conviction was based. And, for the reasons stated in this petition, we think the Court of Appeals' second reversal of his conviction

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[13] See our explanation of this point in our petition for rehearing below (R. 172, note 6).

[14] See pp. 7-30 of our brief on the writ in the former proceeding in this Court.

to be unwarranted, and inconsistent with decisions of this Court and of other Courts of Appeals. It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

APRIL 1950.

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